



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR3072/12

In the matter between:

ROSETENVILLE RENTALS

Applicant

and

PHUMLA PATIENCE TSHUTA

First Respondent

COMMISSIONER M M BALOYI N.O.

Second Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

Third Respondent

Heard: 2 July 2014

Delivered: 28 January 2015

Summary: Review application in terms of section 145 of the Labour Relations Act 66 of 1995 as amended. Employee dismissed before disciplinary hearing held and offered to attend disciplinary hearing subsequently, but to be chaired by same person who had fired employee. Decision of Commissioner that same was procedurally unfair not reviewed. Commissioner however failing to consider evidence in relation to the substantive aspects of the matter. In respect of such

substantive aspects no reasonable Commissioner, on the evidence before the Commissioner could have come to the conclusion that the dismissal was substantively unfair. Accordingly award reviewed and set aside in part and substituted in part.

JUDGMENT

SNIDER AJ

- [1] This is a review application in terms of which the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent ("the Commissioner") given by the Commissioner on 16 November 2012.
- [2] Briefly, the background to this matter is as follows. The applicant is in the business of letting premises to various entities, be they individuals or companies. In the event of the applicant's tenants defaulting on their rental payments, the applicant would take possession of whatever goods there were at the rented premises, presumably in terms of a lien or other contractual right. The mechanism behind the attachment is not relevant for the purposes of this judgment. The attached goods were stored by the applicant in a storeroom on its premises.
- [3] The first respondent ("the employee") was employed by the applicant on a fixed term basis from 1 April 2012 until 30 March 2013, although it emerges from the transcript of the arbitration which preceded this matter that she had also had previous periods of employment with the applicant.
- [4] On 25 August 2012 the employee, together with other employees of the applicant were instructed to clean the storeroom referred to above.

- [5] There is some dispute as to the events which then transpired, but what is common cause is that certain items belonging to former tenants of the applicant, that had been attached by the Applicant as described above, were taken by some of the employees who were working at the premises on that day doing the job of cleaning the storeroom.
- [6] It is also common cause that the employee was involved, to some degree, in the removal of certain of the said goods from the applicant's premises.
- [7] At the very least, and this appears to be common cause, the employee gave permission to other of the employees of the applicant to take certain items from the storeroom. There was evidence from the applicant that the goods removed were not in good condition, but I do not regard this as being of any great relevance.
- [8] The employee together with the other employees and the daughter of the principal of the applicant, Moosa Abdul Khabeer ("Khabeer"), whose name is Mishka Khabeer ("Mishka") were effectively caught by Khabeer in the act of removing the said goods from the applicant's premises. The goods were loaded into Mishka's car in order to be removed. Although it does not appear that the employee was found in physical possession of any of the goods, she was, as set out above, certainly a part of the series of events which led to the removal of the said goods.
- [9] At the very least she gave permission for the removal to take place. Shortly after the employee, the other employees and Mishka departed the applicant's premises Khabeer phoned the employee and told her that she, along with all of the other employees were "fired".¹
- [10] Although Khabeer has attempted to deny this, it is plain from the transcript

of the arbitration proceedings that this is what took place and Khabeer's evidence in this regard is highly unsatisfactory, contrived and lacks credibility. At one point he seems to advance a version that the employee was both fired and suspended at the same time. The evidence is absurd. In regard to this (procedural) aspect of the matter there can be no question that the Commissioner reached a conclusion that another reasonable Commissioner could have reached with the same evidence before him. The Commissioner's finding in this regard, to wit that the dismissal of the Applicant did in fact take place on 25 August 2012 is accordingly not reviewable.

[11] There cannot be any serious contention that the employee was suspended as opposed to being dismissed.

[12] I accept that in *Semenya and Others v Commission for Conciliation, Mediation and Arbitration and Others*² it was found that that in principle, a hearing after a decision to dismiss had been taken could be found to be procedurally fair. However the decision taken by the Commissioner was still within a band of reasonableness under the circumstances, particularly bearing in mind that in *Semenya supra* the Court, per Zondo JP, as he then was, found that it was highly significant that the offer of an independent chairperson chairing the subsequent disciplinary enquiry, and the continued refusal of the employee rendered the dismissal procedurally fair under those particular circumstances and prevented the employee in that matter from succeeding on the basis of a procedurally unfair dismissal.

[13] In this matter the supposed "enquiry" was chaired by Khabeer and, with respect, having regard to the transcript, it does not appear that this hearing would pass muster in circumstances where Khabeer himself had

¹ Transcript page 23 lines 6 to 10

already told the employee that she was fired. The fact that other employees were re-instated under the circumstances similarly does not avail. Clearly they scapegoated the employee in the course of the hearing to benefit themselves.

[14] My impression from the transcript was that the purported disciplinary enquiry was shambolic to say the least. No fair process appears to have been followed and, *inter alia*, evidence against the employee was heard in her absence.

[15] The applicant also aprobrates and reprobates. On the one hand the allegation is that the employee was suspended, not fired, while on the other hand the Applicant wishes to argue that even if she was fired, Semenya (*supra*) applies. The Applicant should have, with respect, chosen which horse to saddle. These are not alternatives that sit comfortably together.

[16] As set out above, I thus have no hesitation in finding that, on a procedural level, the Commissioner's award cannot be reviewed.

[17] However when the issue of substance is considered other factors come into play.

[18] The essence of the employee's case on the merits of her misconduct was effectively that she had the authority, granted to her by Khabeer, to allow other employees to take possession of goods which she, in her own discretion, determined were of no value.

[19] It is absolutely critical, in my assessment of this matter, and in view of this

² (2006) 27 ILJ 1627 (LAC)

defence of the employee, that this version was not put to Khabeer by the employee in cross-examination when she had the opportunity to do so at the arbitration.

[20] The employee, in light of this failure, which is a most basic one, and follows upon the Commissioner's detailed explanation of the arbitration process³ which must have alerted the applicant to the need for her to deal with this issue in cross-examination, cannot be believed when she says, in her subsequent testimony, that she had authority. The failure to cross-examine on the point is fatal to her in this context.

[21] The Commissioner simply fails to deal in any meaningful way whatsoever with the substantive merits of the matter including, *inter alia*, the crucial point referred to above.

[22] The employee clearly implicates herself and does so repeatedly. She was clearly involved in the removal of the goods, whatever they were, and when given the opportunity does not deal with the key issue which he says exonerates her, that she was acting under the authority of Khabeer in doing what she did.

[23] I am of the view that no reasonable Commissioner, having regard to the full conspectus of the evidence in relation to the substantive issues, could come to the conclusion that the applicant had been substantively unfairly dismissed. She was involved in the removal of the goods and had no explanation as to why.

[24] The principles surrounding the test for reviewability are now notoriously well known and can be gleaned from *Simudo and another v Rustenburg*

³ Transcript page 3 lines 1 to 5

Platinum Mines Limited and Others;⁴ *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)*;⁵ and *Goldfields Mining (Pty) Limited (Kloof Goldmine) v Commission Conciliation Mediation Arbitration and Others*.⁶

[25] The following is, with respect, a useful exposition of the test from the Judgment of Wagley J P in the *Kloof* decision –

“Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, determination of the reasonableness of the decision arrived at by the arbitrator. The Court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (“the LRA”) continued to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of section 145 of the LRA. This implies that the application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and / or excess of powers will not lead automatically to setting aside of the award if any of the above grounds are found to be present. In other words in a case such as the present where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.”

[26] Bearing in mind what is set out above and that all of the relevant material is before me I see little sense in referring this matter back to the third respondent for re-hearing. I am strongly of the view that the Applicant should pay an amount to the employee which is commensurate with the abysmal procedure it followed. Accordingly I am inclined to substitute the

⁴ [2007] 12 BLLR 1097 (CC)

⁵ (2012) ILJ 1789 (LAC)

award of the Commissioner and I make the following order -

Order:

- i. The award of the Commissioner that the dismissal of the employee was substantively unfair is reviewed and set aside.
- ii. The finding of the Commissioner that the dismissal was procedurally unfair is not reviewed and remains in effect.
- iii. The order of the Commissioner that the applicant is to pay the employee an amount of R28,000.00, being the equivalent of 7 months remuneration (the remaining duration of her fixed term contract, her monthly remuneration having been R4 000) is reviewed and set aside and substituted with the following –
- iv. The Applicant is, following on its procedurally unfair dismissal of the employee, ordered to pay the applicant the sum of R20 000 being the equivalent of 5 month's remuneration of the applicant at the time of her dismissal, being R4,000 per month.
- v. Given that neither party was entirely successful or unsuccessful, I make no order as to costs.

SNIDER, A J

Acting Judge of the Labour Court of South Africa

⁶ (2014) 35 ILJ 943 (LAC) at paragraph 14

Appearances:

For the Applicant: Mr Ross Atcheson of Lee & McAdam Attorneys

For the Respondent: Mr Ludwig Frahm-Arp of Fasken Martineau Attorneys